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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/812,639	03/20/2001	Michael R. Levine	LVN-0860203	1113
25006 7590 02/12/2008 GIFTORD, KRASS, SPRINKLE, ANDERSON & CITKOWSKI, P.C PO BOX 7021 TROY, MI 48007-7021				
EXAMINER KOPPIKAR, VIVEK D				
ART UNIT		PAPER NUMBER		
3626				
MAIL DATE		DELIVERY MODE		
02/12/2008		PAPER		

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1 RECORD OF ORAL HEARING
2
3 UNITED STATES PATENT AND TRADEMARK OFFICE
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6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
8
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10 Ex parte MICHAEL R. LEVINE
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12

13 Appeal 2007-2595
14 Application 09/812,639
15 Technology Center 3600
16
17

18 Oral Hearing Held: January 23, 2008
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21
22 Before WILLIAM F. PATE, III, HUBERT C. LORIN, and ANTON W.
23 FETTING, Administrative Patent Judges
24

25 ON BEHALF OF THE APPELLANT:
26

27 JOHN G. POSA, ESQUIRE (via videoconference)
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32

33 The above-entitled matter came on for hearing on Wednesday, January 23,
34 2008, commencing at 9:00 a.m., at the U.S. Patent and Trademark Office,
35 600 Dulany Street, Alexandria, Virginia, before Ashorethea Cleveland,
36 Notary Public.

PROCEEDINGS

JUDGE PATE: This is a set of hearings pursuant to 37 CFR 41.47. It's January 23, 2008. We are in Hearing Room D and we will be hearing Docket B, Calendar Numbers 35 through 38.

The Judges are Anton Fetting, Hubert Lorin and William Pate, presiding.

Hello, sir. Could we get you to introduce yourself, please?

MR. POSA: John Posa, representing applicant in this case.

JUDGE PATE: Mr. Posa, we have had time to go over this case before the hearing; and with that in mind, we would like to hear your argument. Go ahead.

MR. POSA: Sure. Thanks. Could you let me know who's on the panel, please?

JUDGE PATE: Okay.

MR. POSA: By the way, I did one of these about a week ago and unfortunately unless you speak into the microphone I have trouble hearing you. I hope you can hear me all right.

JUDGE PATE: I can hear you fine. I will move over here closer to the microphone.

We have here Anton Fetting, Hubert Lorin and I'm William Pate. I'm presiding. Also, in the room, in the back, we have two members of the public; and we have Daniel Song who is a member of our staff.

MR. POSA: Okay. Thank you.

I guess if I could get started, I guess what we have here is a bona fide business method application. I have done things that border on it. I think

1 many practitioners have by now; but when I looked over this case, it
2 occurred to me that if anything qualifies as a true business method, this does,
3 maybe one of the reasons why it has taken almost eight years to get here. I
4 realize that these things have some latency in the Patent Office.

5 We're talking about a method of making it more cost effective to get
6 healthcare, through the use of an intermediary which in essence takes the
7 place of an insurance company. It allows you to purchase healthcare on
8 credit, if you will, but only from healthcare providers that have signed onto
9 the program.

10 There are three independent claims on appeal, claims 5, 9, and 12.
11 They're somewhat different in scope. Claim five does not set forth a
12 website. I mean, it's not explicitly Internet based. There are limitations
13 about the timing, used for payment.

14 Independent claim nine adds the idea of a website and independent
15 claim 12 makes it more explicit that this intermediary has financial overtone
16 in terms of a financial intermediary. So, one would get the impression that
17 this is a bank or somebody with more authority to issue these kinds of lines
18 of credit.

19 All of the claims are rejected on obviousness grounds over four
20 references now. There were three for a while but in the later stages of
21 prosecution, another was added.

22 I will refer to these as -- and you know, you're familiar with the
23 records but I'm going to call them Volz. That's I guess the primary
24 reference. Number two I will refer to as healthcare cards. Number three is
25 this SimpleCare system which got downloaded off some Internet website;
26 and number four is M&T which refers to a bank.

1 I want to quickly review what we feel these references teach, if you
2 don't mind. By the way, all of these references are really quite short in their
3 disclosures and we feel quite directed to the problems that they wish to solve
4 and quite narrowly tailored to the descriptions that they have.

5 Volz was started by a doctor who wanted to set up this North America
6 care network. It was down in Florida. I didn't have time to research how
7 well it's doing today. This was ten years ago, or so.

8 To be a member, you pay a modest amount, 15, 20 bucks a month, I
9 guess, to be a member of this thing; and doctors estimate how much it would
10 take to take care of you, and they can't waiver from the estimate once care
11 begins.

12 An important aspect of this system is that you have to pay before the
13 service is provided. If you read the reference, it has two days for some
14 reason. We'll get to that. Then North American Care, NAC for short, takes
15 your money before the procedure and takes a month to pay the doctor after
16 they take their cut.

17 Now, you know, the idea is that there's no insurance company
18 involved. Even though 30 days might -- you know, that's net 30 and it's not
19 net 60 or net 90, like the doctors might wait these days for a managed care
20 system.

21 JUDGE FETTING: Excuse me. Doesn't Volz also provide
22 discounts? Didn't Volz have negotiated discounts for services?

23 MR. POSA: Yes. I mean, that's the point of the system. I think they
24 offer something just over Medicare rates, perhaps; but Medicare rates are
25 significantly less than you could get otherwise. So, certainly, there's some
26 sort of discount involved.

1 The same is true of the SimpleCare system; but before I get to that,
2 the health card reference is just a credit card for health insurance, it seems.

3 The only operative line in there, the one that's used by the Examiner
4 for purposes of motivation is that, you know, by having this additional
5 healthcare card, you don't tie up credit lines on your other cards, whatever
6 that might mean; and again, we'll touch on that a little bit.

7 The SimpleCare system is another plan that tries to give you more
8 cost effective healthcare. The idea is -- and this is their pledge -- that you
9 pay in full at the time of service and you get the lowest price for that.

10 It's similar in a way to the Volz system in that payment around the
11 time that the service is provided allows the doctor to make a little more
12 because you can cut out the middle man in essence.

13 You need to be a member of this American Association of Patients
14 and Providers.

15 The SimpleCare system is all about paying when you're seen, on the
16 spot, paying in full. The idea is to cut out any intermediary, especially
17 insurance companies.

18 JUDGE FETTING: Excuse me, once again. With SimpleCare, it
19 does say that you can use a credit card to pay in full?

20 MR. POSA: I am not certain about that. I'm not sure.

21 JUDGE FETTING: Page two of five, under the rubric, SimpleCare is
22 about value. It says it's available to you when you pay cash, check or credit
23 card.

24 MR. POSA: Right, right, right; at the time that you are seen.

25 JUDGE FETTING: Right. So, you can use a credit card with
26 SimpleCare?

1 MR. POSA: Yeah. But to finish the context there, you have to do it
2 at the time you're seen. That's what the system is all about.

3 JUDGE FETTING: Okay.

4 MR. POSA: M&T Bank is a very short, one-paragraph reference, just
5 talking about a bank. It's some news article about the fact that this bank in
6 Buffalo, New York now is offering additional co-branded cards.
7 Presumably these are credit cards that have the name of an institution on it,
8 the Foods Town Visa Card or whatever.

9 There's a discount in there. You get a reward. You get 2-percent
10 reward for a precise monetary value of \$25,000. That's what that reference
11 is all about.

12 I'm going to go forward preliminarily on the Examiner's answer
13 because it does a good job of summing up where we're at in terms of
14 appellant's arguments and the Examiner's position on this case.

15 If you look at page eight of the Examiner's answer, appellant is
16 accused of making a piecemeal argument. Frankly, it's our position that it's
17 the Examiner who's making a piecemeal argument.

18 The primary reference from the record, the Examiner concedes, is
19 lacking in many, many respects. So, he continues to just pile on other pieces
20 until he sort of gets at what appellant is claiming. However, one of our
21 arguments is that he doesn't get close enough. Even with these four
22 references, not all of appellant's limitations are addressed.

23 Appellant makes the argument and the Examiner refers to it that the
24 Volz and the health card systems are simply not compatible with each other;
25 and it's true.

1 The Examiner uses the motivation to combine these two references on
2 the grounds that this would allow the user to pay at a later date. That's part
3 of appellant's claimed method, that you don't have to pay when you get
4 service provided but because of the way that the system is set up, you can
5 pay later and yet get a discounted service for doctors or other institutions
6 that are a part of this system. So, everyone is happy, including the recipient
7 of the healthcare who can take their time to pay for it.

8 The idea that you could somehow give Volz a credit card to allow a
9 user to pay at a later date is entirely inconsistent with that reference. The
10 reference makes it clear that except in the case of emergency -- and I'm
11 talking about Volz here -- patients are required to pay prior to the service
12 that they receive. Again, they use the two-day period. Now, why is this?
13 All right. We're talking about a 103 here. So, we're going to ask the person
14 of skill in the art -- why would he have to pay before service is provided?
15 Well, the strong implication is that if you don't pay, the physician can
16 decline to provide the service. I mean, why else would there be this
17 requirement? And indeed, it is a requirement of Volz that you have to pay
18 before you get your service done.

19 By the way, in the healthcare reference, they really don't say how long
20 it will take for the doctor to get paid. Now, this is important. If it takes 60
21 to 90 days, really all you have with that system is what we have today. I
22 mean, I can go out and charge medical expenses on a credit card and then I
23 can take forever to pay. I can just pay those small amounts that they require
24 while a get a balance that continues to grow. There's no telling how long
25 they take to pay the doctor under situations like that.

1 So, to the extent it's over 30 days, it's really no different than the
2 situation we have today. Adding that to Volz wouldn't do anything to
3 address the desire on the part of Volz to have things happen quickly and in
4 fact before service is provided to reduce risks; and that's what Volz is all
5 about, really. If you pay early, if you pay directly, if you only have one
6 broker in the middle doing just a few things to make it happen, you avoid
7 complications and you avoid risks.

8 The doctor is even stuck with his estimate in Volz. I mean, he does a
9 little research to say, it's going to cost X, Y, Z to provide this service and
10 then it becomes his problem if it costs more. The idea is to just simplify,
11 simplify, simplify.

12 So, to add a credit card into the Volz system would complicate,
13 complicate, complicate. It runs counter to the idea of the primary reference
14 to keep it simple.

15 Indeed, the Volz reference seeks to help those without any insurance
16 to avoid what it calls administrative hassles.

17 So, in summary, it's our position that the Volz reference clearly
18 teaches away from the use of credit cards. It would increase this
19 administrative; and so rates costs -- and note, by the way, that the health card
20 -- the rates are on the order of 17 to 21 percent, the credit rates, you know, if
21 you don't pay in full presumably.

22 If you read the Volz reference, it's clearly the intention, especially to
23 serve people without insurance. I mean, presumably these people don't have
24 the money to buy it. It's certainly not in keeping with the Volz reference to
25 use the credit card reference which charges on the order of 17 to 20 percent

1 if you don't pay. Volz acknowledges you might not have the money in the
2 first place. So, the idea is to help the uninsured, not to bankrupt them.

3 So, we feel that our statement that these systems are incompatible is
4 true.

5 On page five of the Examiner's answer, the Examiner explains that the
6 SimpleCare reference is used in the claims that are Internet based, claim nine
7 for example, that SimpleCare is added to the Volz and health card
8 combination on the grounds that this would reduce -- and this is the
9 motivation. This is on page four of an earlier office action, the one before
10 the final office action -- that this would reduce administrative costs and pass
11 savings on to consumers in the form of reduced fees. But there's no
12 evidence that that is true. I mean, it appears to be a wishful fabrication.

13 The reduction in administrative costs of the primary reference, namely
14 Volz, clearly comes from paying at the time that service is provided. I
15 mean, this has nothing to do with the use of the Internet.

16 Indeed, if you were to use the Internet with Volz and health cards, for
17 example, which the Examiner proposes, you'd have a system where you
18 have yet another -- more risk, another mechanism, another infrastructure that
19 would be required to get the job done.

20 But the pledge -- again, just to review what the health card reference
21 has to say, patients who pay in full at the time of service get our lowest
22 price. It's all about paying when you're seen. That's why there's a reduction
23 in administrative costs, not from the use of the Internet.

24 So, the Examiner's motivation to add the simple card because it would
25 reduce administrative costs is not redundant and clearly not directed to the

1 reason why administrative costs are reduced in systems where you have to
2 pay on a timely basis.

3 JUDGE FETTING: Excuse me. Does claim five refer to the Internet?

4 MR. POSA: No; I don't think it does. As I said when we opened up
5 here, claim five does not. However, claim five does include that the last
6 limitation is subsequently paying the intermediary; in other words, after
7 services are provided, according to the contract between the healthcare user
8 and the intermediary. As I said, claim nine has use of the Internet.

9 JUDGE FETTING: I guess I'm a little confused because in looking at
10 your argument section, I don't see you distinguishing claim five from claim
11 nine.

12 MR. POSA: Well, I believe that the argument section, to answer your
13 question, simply tracks the arguments made by the Examiner for the
14 purposes of rejection; and the Examiner didn't make a distinction either, if
15 you look at the record.

16 I think both on the part of the Examiner and on the part of appellant,
17 there's an underlying understanding of what the claims teach and the reasons
18 why certain references are used with respect to certain of the independent
19 claims. That's the only explanation I can give you.

20 The answers, the responses to appellant, simply track those made by
21 the Examiner which is also not claim specific, as you can see from the office
22 actions and the Examiner's answer.

23 By the way, the Examiner references pages one and two of this
24 SimpleCare reference but we couldn't see that this download is actually
25 using a website for the purposes that appellant uses them for. There are

1 certain details, in claim nine for example, about the way in which the
2 Internet is used to bring about this service.

3 It seems like this download on SimpleCare simply describes the
4 system. It's difficult to tell. It's old and it was found through an archive, I
5 guess. It's difficult to tell the degree to which you actually use that website
6 to perform these functions.

7 JUDGE PATE: Mr. Posa, let me remind you've got about two
8 minutes left.

9 MR. POSA: I'm almost done.

10 Again, there was a limitation added. There was an amendment made
11 at the eleventh hour which resulted in the Examiner adding this M&T
12 reference which, if you read it, entirely unrelated to healthcare. Okay? No
13 mention of healthcare there. It's added because a discount is provided.
14 However, this discount is related to a specific amount, \$25,000. It's related
15 to an amount of money and not an industry. Okay? It's not directed to the
16 fees that healthcare providers charge which is what appellants they're
17 directed to.

18 Again, I urge you to look at the Examiner's answer in this case, on
19 page ten. What the Examiner says about M&T teaching what appellant's
20 claims actually set forth is simply not true.

21 So, as far as those claims to which M&T is applied, it falls short of
22 even the combination. All four of these references fall short of teaching or
23 suggesting all of the elements of appellant's claim, thereby failing to
24 establish prima facie, obviously.

25 JUDGE PATE: Thank you.

26 Judge Fetting, any questions?

1 JUDGE FETTING: No further questions.

2 JUDGE PATE: All right. Judge Lorin?

3 JUDGE LORIN: No. No further questions.

4 JUDGE PATE: I have no further questions. Thank you for your
5 presentation and we will take this case under advisement.

6 MR. POSA: Thank you very much.

7 (Whereupon, at approximately 9:25 a.m., the proceedings were
8 concluded.)